IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY,
Also known as BLUE SHIELD OF TEXAS, et al.,
Defendants-Appellants

vs.

ROYAL DRUG COMPANY, INC., doing business as
ROYAL PHARMACY OF CASTLE HILLS
and DISCO PRESCRIPTION PHARMACY, et al.,
Plaintiff-Appellees

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF AUTOMOTIVE SERVICE COUNCILS, INC.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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AMICUS CURIAE BRIEF OF AUTOMOTIVE SERVICE COUNCILS, INC.*

Automobile Service Councils, Inc. (ASC) is incorporated in the State of Illinois as a nonprofit and tax exempt corporate body. As a national trade association it represents over 5,000 independent businesses in the automotive repair and service industry. It is organized as a federation of regional, state and local trade associations usually incorporated by members who are individuals, partnerships or small corpora-

* Consent required for filing of this Amicus Curiae Brief by Rule 42(2) has been granted by the parties in a joint letter dated April 10, 1978 and filed with the Court on April 13, 1978.

tions servicing and repairing motor vehicles. These comparatively small businesses have the tools, equipment, skilled manpower and facilities necessary to perform competent motor vehicle repair, maintenance and related services for their customers. They compete on a daily basis with many larger, well financed corporate chain and new car dealer franchises.

THE INTEREST OF THE AMICUS CURIAE

ASC members are small enterprises engaged in the business of automobile service and repair. A large dollar amount of their revenues is earned from repairing automobiles which have been damaged in collisions. This collision repair work is not only the largest source of business for many members, but some are exclusively "body shops". This work usually involves the automobile insurance companies because their insureds, the automobile owners, are the customers and potential customers for which ASC members compete. For this reason the survival of many ASC members depends to a large extent upon the practices of insurance companies and their adjusters. Many of the practices engaged in by the insurance companies are of an anticompetitive nature, but for which insurance carriers have eluded antitrust liability asserting an alleged exemption of such practices from the application of the antitrust laws because of the McCarran-Ferguson Act.

Annually there are approximately 23 million auto collision related repairs for which insurance companies pay claims. These claims payments are estimated to be in excess of ten billion dollars annually.

ASC, acting for its members and other members of the auto repair industry, has a vital interest in this matter. ASC members identify with the plaintiff

pharmacies because they perceive the Pharmacy Agreements, as characterized by the Court of Appeals, to be "price fixing agreements". In much the same way the automobile repair industry has been subjected to fixed prices or rates of repair, by insurance companies' agreements.

The "Participating Pharmacy Agreement" not only restrains competition among pharmacies, but also excludes the nonparticipant from any effective access to the insureds' drug needs. A requisite parallel exists with insurance company practices applicable to automobile repairers. Those repairers who refuse to accept uniform practices and prices of the insurance carriers are excluded from not only present, but also future business with any such insurer. It is common practice for large insurance companies to engage in boycotts, coercion and intimidation to achieve discounts on parts, labor and other materials to be furnished by the auto repair shops. They designate acceptable repair shops on a "preferred list". As the member of the health maintenance plan should be free to choose to deal with a nonparticipant pharmacy, an insured auto owner should be free to choose any auto repairer. Free competition in the open market place should be the determinent factor in prices and costs.

ASC, on behalf of its members and all others in the auto repair industry, files this Amicus brief because the insurance company's practices encountered by the plaintiff pharmacies are similarly encountered by the auto repair industry. The net result to both is to restrain trade, unduely restrict competition and to cause serious economic injury to the public. These contractual arrangements are not the "business of insurance"

but rather a blatant violation of the Federal Antitrust Laws.

The central issue is whether the "Pharmacy Agreements" which are admittedly restraints of trade and which result in an intended boycott of these plaintiffs fall within the perview of the McCarran-Ferguson Act exemption. However the impact of the resolution of this issue involves far more than the Pharmacy Agreements. The resolution of the question will either be the beginning point of other contractual arrangements which insurance companies will institute and expand under the red herring of "cost containment" or it will be the end of such anti-competitive conspiracies and agreements. The case has other important considerations than price fixing agreements among drug stores and health insurance companies. It goes to the relationship of all third parties who may wish to compete in a free and open market place to provide services or products to consumers.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit is eminently correct that such contracts must be judged under the full light of the antitrust laws. This Amicus respectfully submits that the Court of Appeals properly found that by using the test supplied by this Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 US 453 (1969) and in *St. Paul Fire & Marine Insurance Co., et al* v. *Barry et al*, No. 77-240 decided June 29, 1978; 555 F. 2d 3 (CA 1 1977), that such contracts as exemplified by the Pharmacy Agreements are not immune to antitrust scrutiny.

The Circuit Court recognized, as this Court does, that the central point in this matter involves two competing

ideas or rule systems. The antitrust laws have been enacted to prevent unreasonable trade restraints and the destruction of competition. Therefore any exemption to the antitrust laws must be strictly construed.

As to the insurance industry, Congress enacted the McCarran-Ferguson Act so as to limitedly authorize carriers to take actions which otherwise might violate the antitrust laws. The extent of this exception must, obviously, be given the closest scrutiny.[1] The Circuit Court was correct in refusing to expand the exemption to cover the Pharmacy Agreements.

There no longer exists any question that only an extremely limited number of business practices of insurance companies are within the McCarran-Ferguson exemption. The Pharmacy Agreements are not an essential part of the "business of insurance". Blue Shield could write the insurance coverage for drugs and pharmaceuticals without the Pharmacy Agreements, and in fact, that is what transpires when an insured has a prescription filled by a nonparticipant. The insurer owes no obligation to its insureds to fix retail

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[1] This is particularly true when the courts are called upon to resolve a conflict in statutes presuming that Congress intended to "implicitly repeal" a certain provision of the antitrust laws to an extent that it would authorize the conduct which, otherwise would violate the antitrust laws. An "implied exemption" is similar to an "implied expansion of an exemption" and these are not easily deduced:

> it is cardinal principle of construction that repeals by implication are not favored, when there are two acts on the same subject and the rule is to give effect to both if possible . . . There must be a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." *United States* v. *Borden*, 308 US 188, 198 (1939).

prices. Such conduct is repugnant to our well established public policy of free and open competition. The reliability of Blue Shield need not depend upon its ability to determine retail prices, fix them by agreement with certain suppliers, and then administer its program of claims and payments in a way to exclude nonparticipating suppliers and to coerce them to participate.

ARGUMENT

I. THE CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE PHARMACY AGREEMENT IS NOT A PART OF THE BUSINESS OF INSURANCE AND IT IS NOT COVERED BY THE EXEMPTION OF THE McCARRAN-FERGUSON ACT.

While the history of the Blue Shield Health Care Agreements is interesting, particularly that it is the result of union negotiated contracts, it has little significance in this matter. While it is also true that defendant Blue Shield is regulated by the Texas Board of Insurance, that too has little to do with the Pharmacy Agreements.

Two points can be made concerning the Pharmacy Agreements. The first is that no matter how much discussion or analysis of the purpose of health care organizations and their methods of contracting and operating, it will not extend them special privileges nor expand the McCarran-Ferguson Act. The alleged benefits they provide and the alleged good services performed do not relieve them from antitrust standards. The second point is that the review and approval of the State Board of Insurance of Texas does not change the character nor the use, and the resulting injury caused by the use of the Pharmacy Agreements.

The petitioners argue that regulation of the Blue Shield's policies and Pharmacy Agreements under the Texas Insurance Code confirms that they are the "business of insurance". (Petitioner's Brief, Page 31) They refer to "pervasive" regulation by the State Board of Insurance and the conclusion of the Attorney General of Texas as demonstrative that the agreements are the "business of insurance". The approval of the State Board described by the Circuit Court is not "pervasive" regulation and it does not prove that these Pharmacy Agreements were anything other than what that court found them to be.

Similarly a contract and riders used by automobile insurers, are submitted for state board or commission approval. The rates charged are submitted for state approval, and other systems of operations are subject to state scrutiny including claims processing and settling procedures, but none of these functions should be allowed to ruin competition or to fix the prices for automobile repair. Not every insurance company function a state insurance commissioner or state attorney general may review is business of insurance and the review does not make it so, and bring that within the McCarran-Ferguson Act in order to remove it from Federal Antitrust. *St. Paul Fire & Marine Insurance Co., et al.* v. *Barry, et al,* No. 77-240, decided June 29, 1978; 555 F. 2d 3 (CA 1 1977).

The Circuit Court considered the petitioner's arguments concerning state regulation and whether this made it business of insurance. The Court said:

> It is clear from the record that the Board has never approved the Pharmacy Agreement and the Division Manager of the Board's Policy Approval Division, a Mr. Pogue, testified that he thought

> the Pharmacy Agreement was outside the state's regulatory control . . .
>
> The testimony of these officials, therefore, at best raises a factual issue concerning the state's position. (Referring to testimony of Mr. Pogue and a former State Board employee, Mr. Connor.) (556 F.2d 1375, 1384-85)

The Pharmacy Agreement did not come under the jurisdiction of the State Board of Insurance for the simple reason that it did not constitute the "business of insurance."

In summary, the Pharmacy Agreements were not the "business of insurance" by their very nature and purpose. They could not be made so by the alleged good purpose claimed by the petitioners.

II. THE McCARRAN-FERGUSON ACT EXEMPTION SHOULD BE STRICTLY CONSTRUED AND THE TERM BUSINESS OF INSURANCE APPLIED AS A LIMIITED AND NOT EXPANDABLE TEST.

The *National Securities* definition of the term "business of insurance" was properly applied by the Circuit Court. The relationship between insurer and insured is not dependent upon these Pharmacy Agreements. The petitioners argue that the Pharmacy Agreement determines the type of insurance policy issued and thus it is the "business of insurance". (Petioner Brief, Page 14) This is not a logical conclusion. The basic consideration is that Blue Shield in no way needs the Pharmacy Agreement as a part of its insurance program. This is made obvious by the provisions of its program for nonparticipating pharmacies. The Circuit Court analyzed the contract of insurance and made the legal obligation plain:

> Blue Shield's sole obligation is to see that the insured received prescription drugs and shall be required to pay no more than the drug deductable for each of the covered drugs. It is unnecessary for Blue Shield to agree with pharmacies to fix retail prices in the pharmaceutical industry." (556 F.2d 1375, 1381)

The plaintiffs reason that Blue Shield could have offered a different contract, but in the exercise of its business judgment it "decided to issue policies providing for goods and services benefits rather than offering cash indemnification exclusively." This leads to thoughts of total health care maintenance systems or programs. These systems require contracts with various suppliers, hospitals and physicians. The reasoning then turns to "low cost delivery" or "cost containment". There is no doubt that these are important objectives but not at the expense of independent competing businesses. Furthermore, while lip service is paid to this concept, that is all that is done. Fair, free and open competition, by its very nature has been found on numerous occasions by this court to be the best method of "cost containment".

The Circuit Court recognized that the McCarran-Ferguson Act, by its nature and purpose, must be narrowly construed and not given an expanded construction. It recited the illustrations used by the appellees that "automobile insurers will be able to utilize participating Repair Shop Agreements and coercion to fix prices for parts and labor in the automobile industry." It described possible agreements among fire insurance companies and construction companies. The court properly rejected the temptation to think expansively.

The danger, of course, of such expansionary thoughts is always present when large financial institutions extend influence and control by means of agreements which determine costs, margins, amounts of services and the prices of goods and services which are to be supplied by a very narrow group of selected suppliers.

The domination of the auto repair shops by the insurance carriers often forces the shops to employ a lower quality of repair to the insured's vehicle thus inflicting accelerated depreciation in the value of the insured's vehicle. We estimate this hidden loss to be approximately $500 million annually.

III. THE PRESENCE OF PRICE FIXING SUPPORTED BY COERCION AND BOYCOTT DIRECTED AGAINST SMALL COMPETITORS PRECLUDES JUDICIALLY EXTENDING THE McCARRAN-FERGUSON ACT EXEMPTION TO INCLUDE ALL PROVIDER AND SERVICER ARRANGEMENTS.

Most of the arguments supporting the position of the insurance company rely heavily on the proposition that anything that helps to reduce or contain the cost of insurance must benefit the public to such an extent that Congress must have intended to legislate assistance to this good purpose. However, in this matter, the nonparticipating pharmacies should not be sacrificed to promote this result and it is submitted that Congress never intended such a result.

Few would disagree that the setting of insurance premium rates to be charged to the insurance customer by the insurance company is the business of insurance under the McCarran-Ferguson Act and *National Securities*. It appears from some cases, however, that the insurance companies are trying to succeed in mixing the labor rates and product costs of third party suppliers with state regulated premium rates. This was rejected by the Fifth Circuit as unnecessary and unwarranted.

The Fifth Circuit Court was not persuaded to follow *Manasen* v. *California Dental Services,* 424 F. Supp. 657 (N.D. Cal. 1976); *Anderson* v. *Medical Service of the District of Columbia,* 551 F. 2d 304 (4th Cir. 1977) and *Frankford Hospital* v. *Blue Cross,* 554 F. 2d 1253 (3d Cir. 1977), and it distinguished *Travelers Insurance Company* v. *Blue Cross,* 481 F.2d 80 (3rd Cir.), cert. denied, 414 U.S. 1093 (1973). Whether there is any distinction in principle between these cases and *Royal* is arguable. It is obvious that it is easier to find the health services agreements with hospitals and physicians to be included within "business of insurance". As the court said "the *Travelers* decision was based in large measure on the Pennsylvania legislature's control over rates charged by nonprofit hospitals." In *Anderson* the matter involved a suburban physician with a substantial practice and the defendant insured medical-surgical benefits to some 1,300,000 persons in metropolitan Washington, D.C. Some 93% of the practicing doctors in the area were participating physicians under contract and plaintiff was the only nonparticipant in Northern Virginia. These cases differ markedly on the facts from *Royal.*

The Circuit Court summed up the matter well in dismissing the importance of one of these contrary decisions:

> *Manasen* and other cases have emphasized the favorable impact that price fixing and coercion have had on insurance premiums and the 'reliability' of the insurers. It is conceivable that the public might benefit from price fixing arrange-

ments as long as parties to the arrangements agree to keep prices below free market levels. The Congress, however, has foreseen that the power to fix prices might not always be beneficially administered by those parties holding the power once their competition has been put out of business." (556 F. 2d, 1387, 1386)

A very recent decision of this court in *St. Paul Fire & Marine Insurance Co. et al.* v. *Barry et al.*, No. 77-240, decided June 29, 1978; 555 F. 2d 3 (CA 1 1977), did not involve Section 2(b) of the McCarran-Ferguson Act, but the examination and application of the legislative history of McCarran-Ferguson applies. *Barry* involved Section 3(b) and the interpretation of the term "boycott".[2] The Court commented that:

> The debates make clear that the 'boycott' exception was viewed by the Act's proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." (Slip Op. P 14-15)

The broad and unqualified language of Section 3(b) was not intended to limit its application to insurance companies or agents and was not intended to preclude Sherman Act protection for policyholders and others.

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[2] As the Court describes it:

> Section 2(b) is not in issue in this case. Rather we are called upon to interpret, for the first time, the scope of Sec. 3(b), the principal exception to this scheme of pre-emptive state regulation of the "business of insurance".
>
> The Court of Appeals in this case determined that the word "boycott" in Sec. 3(b) should be given its ordinary Sherman Act meaning as "a concerted refusal to deal". (slip op. p. 7-9)

Petitioners in *Barry* wanted the Act interpreted favorably to them by the narrowest construction of Section 3(b). They reasoned incorrectly that since the Court broadly interpreted Section 2(b) of the Act in *National Securities* and in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), that Section 3(b) must be narrowly construed to further the broad purpose of Section 2(b). The Court rejected this reasoning:

> . . . Section 3(b) is an exception to Section 2(b), and (that) Congress intended in the "boycott" clause to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny." (Slip Op. P. 19).

It has been shown, earlier in this argument that as the Court found in *Barry* "there was no state authorization of the conduct in question" in *Royal.*

It is reasonable to conclude that as Congress intended the practice of "boycott", which caused injury to policyholders of insurance companies, to be removed from the exemption of the Act, it also intended that the equally destructive practice of price fixing by agreement with third party suppliers which causes injury to nonparticipant parties, to be not exempted. There is reason to assume that some of these smaller competitor pharmacies would be eliminated by this Participating Pharmacy Agreement if the Circuit Court is not upheld. To reverse the Circuit Court would place an inordinate power over commerce into the hands of the insurance companies. Actual or potential abuse of such power calls for a strict interpretation of the exemption granted in the McCarran-Ferguson Act.

CONCLUSION

The Pharmacy Agreement is not within the "business of insurance". No other facts support any other conclusion. If the Fifth Circuit is not upheld a multi-billion dollar segment of the auto body repair industry will be without the protection of the antitrust laws. The Fifth Circuit should be affirmed.

Respectfully submitted,

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